Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROBERT H. CHANDLER, II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an instrumentality test the proper test for determining excessiveness under the Excessive Fine Clause of the Eighth Amendment of a civil forfeiture of real property pursuant to 21 U.S.C. §§881(a)(6) & (a)(7), as held by the Court of Appeals below, or should the proper standard be one of proportionality as adopted by other courts of appeals in applying this Court's decision in Austin v. United States, ___ U.S. ___, 113 S.Ct. 2801 (1993) where, as in this case, forfeiture of a 33-acre farm worth over one-half million dollars is the res.

2. In §881(a) forfeiture actions, does not the Due Process Clause of the Fifth Amendment, the Bill of Attainder Clause of Article I of the Constitution, and the Excessive Fines Clause of the Eighth Amendment require that the Government as plain-

tiff bear the burden of proof throughout trial that the real property in question was used to facilitate controlled substance violations, or was improved with the proceeds of drug transactions--and that Petitioner Chandler, the owner-claimant, had actual knowledge of such?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fourth Circuit are Petitioner Chandler, claimant-owner of a 33-acre farm, and the United States, which brought the action to forfeit said farm pursuant to 21 U.S.C. §§881(a)(6) & (a)(7).

STATEMENT OF CORPORATE AFFILIATION

No corporations are involved in this matter presently. Claimant Eastern Skateboard Supply, Inc., entered into a Stipulation for Compromise Settlement, as noted in Par. 1 of the District Court's Final Decree and Judgment of Forfeiture (which appears in the Appendix at p. 20a, etc.).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
STATEMENT OF CORPORATE AFFILIATION	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	4
REASONS FOR GRANTING THE PETITION	16
I. THE FOURTH CIRCUIT'S RULING VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT BY REFUSING TO ADOPT A PROPORTIONALITY ANALYSIS AND CREATES A SPLIT IN THE CIRCUITS WHICH SHOULD BE RESOLVED	16
II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT, AND THE BILL OF ATTAINDER CLAUSE IN ARTICLE 1 OF THE CONSTITUTION REQUIRE THE GOVERNMENT TO HAVE THE BURDEN OF PROOF IN FORFEITURE ACTIONS UNDER 21 U.S.C. §§ 881(a)(6) & (a)(7)	21
CONCLUSION	29

TABLE OF AUTHORITIES

CASES Page

Austin v. United States
___ U.S. ___, 113 S.Ct. 2801 (1993)
..... 16,17,18,22

Boyd v. United States
116 U.S. 616 (1886) 26

Browning Ferris Industries v. Kilco
Disposal, Inc., 492 U.S. 257 (1989).. 19

Department of Law Enforcement v. Real
Property, etc.
588 So.2d 957 (Fla. 1991) 24

Department of Revenue v. Kurth Ranch
___ U.S. ___, 114 S.Ct. 1937 (1994).. 23

Fletcher v. Peck
6 Cranch 83, 3 L.Ed. 162 (1810) 28

In re Winship
397 U.S. 358 (1970) 26

Landon v. Plascencia
459 U.S. 21 (1982) 25

Santosky v. Kramer
455 U.S. 745 (1982) 24

U.S. v. Alexander
__ F.3d ___ WL 328566 (8th Cir. 1994)
..... 17

U.S. v. Brown
381 U.S. 437 (1965) 28

U.S. v. 835 Seventh Street Rensselaer
832 F.Supp. 43 (N.D. N.Y. 1993) 18

TABLE OF AUTHORITIES

Page

U.S. v. James Daniel Good Property
____U.S. __ (1993) (No. 92-1180) .. 26

U.S. v. Leasehold Interest
760 F.Supp. 1015 (E.D.N.Y. 1991) ... 23

U.S. v. Littlefield
821 F.2d 1365 (9th Cir. 1987) 19

U.S. v. One 1985 Mercedes
917 F.2d 414 (9th Cir. 1990) 27

U.S. v. R.R.#1
14 F.3d 864 (3d Cir. 1994) 17

U.S. v. Sarbello
985 F.2d 716 (3d Cir. 1993) 17

U.S. v. Shelly's Riverside Heights Lot X
851 F.Supp. 633 (M.D. Pa. 1994) 18

U.S. v. 6625 Zumirez Drive
845 F.Supp. 725 (C.D. Cal. 1994) ... 18

U.S. v. 38 Whalers Cove Drive
954 F.2d 29 (2d Cir. 1992) 18

U.S. v. 24214 Lamay Street
1994 WL 272026 (C.D. Cal. June 15, 1994)
..... 18

Constitution

Art. 1, §9 21,27
Amend. IV 26
Amend. V 21,25,26
Amend. VIII 16,18,19,21,22,23

TABLE OF AUTHORITIES

Page

United States Code
21 U.S.C. 881(a)(6)&(7) 22,23,27

Secondary Authority
Constitutional Rights & Civil Forfeiture Actions, 88 Colum.L.Rev. 390 (1988) .. 27

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OCTOBER TERM, 1994

ROBERT H. CHANDLER, II,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this action on September 27, 1994.

OPINION BELOW

The opinion of the court of appeals (App., infra, 1a-15a), together with the concurring opinion of Judge Wilkinson (App., infra, 15a-19a), is reported at 36 F.3d 358 (4th Cir. 1994). The district court, upon a jury verdict against Petitioner, entered a final Decree and Judgment of Forfeiture on August 5, 1993. (App 20a-24a).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on September 27, 1994. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Art. 1, § 9. [3.] No bill of attainder...shall be passed.

U.S. Constitution, Amendment V. ...nor shall any person...be deprived of...property

...without due process of law...

U.S. Constitution, Amendment VIII. ...nor excessive fines imposed....

STATEMENT OF THE CASE

On July 15, 1991, the Government as Plaintiff filed a Complaint of Forfeiture of the subject real property. The Claimant and title holder of the real property, Robert H. Chandler, II, filed his Claim to the property on September 18, 1991, and filed an Answer to the Complaint on September 18, 1991.

After pre-trial proceedings, a final pre-trial conference was held and a Final Pre-Trial Conference Order, with Addendum, was filed after approval by the trial court on March 17, 1993.

The case was called for jury trial on May 24, 1993. Following the completion of evidence, the jury was unable to reach a verdict in the case, and a mistrial was declared. A second jury trial was held in this action beginning June 7, 1993.

At both trials over Petitioner's objec-

tions, the trial court upon presentation of the Government's evidence determined that there was probable cause for forfeiture of the real property, and that the burden of proof to show that the property was not used to facilitate controlled substance transactions and was not improved with the proceeds of such sales, was upon the Claimant Chandler.

Under a grant of state and federal immunity, including immunity from the forfeiture of any property, the Government's first witness at the second trial, Gary George, a drug dealer since 1974, testified that he paid $100,000 down on a retail business and made money selling marijuana, cocaine, Quaaludes, and methamphetamines. George testified that in the spring of 1987, he picked up two bales of marijuana from a garage behind the house on the subject real estate, a 33-acre farm. George lived at the

time of the immunity agreement, and prior to that, in a house 15 miles east of Durham. George also testified that John Baucom delivered marijuana for Chandler to George's house.

John Baucom testified that in "the early '80s" he did landscaping and mowing work for Claimant Chandler at the property in question and was paid sometimes in money and a half gram of cocaine. Baucom testified that he planted bushes, kept the grass mowed over ten to twelve acres, and cleaned up around the house, but never specified a date. Again, with no date specified, Baucom testified that on occasion Claimant Chandler would provide Baucom with marijuana for work. Baucom also testified that early in 1987, he saw "a couple of bales of pot" in the trunk of a car in the garage located on the property in question. Baucom further testified at the second trial that he took

marijuana to Gary George's house upon the request of Claimant Chandler. At the second trial, Baucom was testifying under an immunity agreement with the Government. This immunity agreement was entered into after Baucom had previously testified at the first trial of this action. At that trial, Baucom did not testify that he had ever seen any bales of marijuana on the property in question. In 1991, Baucom was interviewed by law enforcement officers and gave them a statement which they wrote down and which he reviewed, but he did not mention any bales. At the first trial, he did not testify that he had seen any bales of marijuana in a garage on the subject property, or in the trunk of a car in a garage on the subject property, nor did he testify that he delivered any marijuana to the house of Gary George. Nor did Gary George at the first trial ever testify that Baucom delivered

marijuana to George's house for Claimant Chandler. During cross-examination at the second trial, came the following colloquy:

> Q You told him [investigator Hallan] that the only thing you knew about Mr. Chandler and drugs is that on occasion he gave you a gram of cocaine or a little bit of marijuana for personal use, didn't you?
>
> A That's all the dealings I had with it, yes.
>
> Q You didn't tell him that you saw any bales in any garage, did you?
>
> A No, I didn't.
>
> Q And you didn't tell him that you carried any bales of marijuana to Gary George's property, did you?
>
> A I didn't tell him, no.

Douglas Frazee, at the second trial, testified for the Government that in either 1984 or 1985, for somewhere between six months to a year, he did general maintenance around the outside of the house, mowed grass, and worked on vehicles for Claimant Chandler at the subject property. He testified that Claimant Chandler paid him in cash

or a combination of cash and cocaine.

The Claimant Chandler was called by the Government during its case-in-chief. Claimant Chandler testified that there was no truth in Baucom's assertion that Mr. Chandler paid him in cocaine or marijuana. Mr. Baucom got most of his pay in the form of firewood that was cut on the property. Gary George never picked up a bale of marijuana at the subject property from Mr. Chandler, or at all to the best of Claimant Chandler's belief. Government witness Frazee did not work on the property other than on one occasion using a weed eater, but he did hang around the property with Mr. Baucom. During the period of time Government's witness Gary George claimed that Claimant Chandler sold him $100,000 worth of marijuana every six months, Mr. Chandler did not sell George any marijuana at all; different real property he was remodeling and renovating was sold at

the courthouse door because Mr. Chandler did not have enough money to make a balloon payment; the sale at the courthouse door meant that Mr. Chandler completely lost that property; Mr. Chandler in November, 1988, lost his townhouse condominium residence to a court foreclosure sale; Mr. Chandler during this period saw his wife's Ford automobile repossessed because he could not make the car payments of approximately $400 per month.

The Defendant offered evidence through David Payne, a brick layer and stone mason contractor, to the effect that he helped construct an addition onto the original house on the subject property; that the stone which went into the masonry work came from the property itself; and that Mr. Payne never saw Claimant Chandler pay anyone with any illegal substances. Mr. Payne never saw any illegal drugs in the possession of

anyone on the subject property. Mr. Chandler would gather rock on the property for Mr. Payne to lay in the house addition; Mr. Chandler would also work on the property mowing grass and cutting firewood--sometimes Mr. Chandler would give Mr. Payne firewood to reduce the amount of money owed to Mr. Payne for masonry work.

Defense witness Jeff Scott testified that beginning in 1980 or 1981 he and his brother, who were in the grading business, did work at the property which is the subject of this action for the Claimant Chandler; that Government's witness Frazee did not work on the property; and that Government's witness Baucom did do some mowing and woodcutting, but "not very often." This witness never saw any illegal substances on the property nor anyone working there paid with controlled substances.

William A. Scott, Jeff Scott's brother,

testified that he first went to the property in question in approximately 1983; that he would work on the property approximately one-third of the year doing grading and landscaping; that he never saw any controlled substances on the property; that he saw Claimant Chandler pay the witness Baucom either at Mr. Scott's restaurant or on the property itself, but never with controlled substances. Mr. William Scott testified that Claimant Chandler would not pay him for his equipment and services with money, but would rather help William Scott work at Scott's steak house restaurant almost every weekend and on an average of 20 to 24 hours per week. Mr. William Scott saw the Government witness Frazee for the first time approximately one month before Claimant Chandler was married in May, 1987, and never saw Frazee do any work around the property at all.

Upon recall, the Claimant Chandler testified that he and his mother obtained the property subject to the litigation--a farm of over 33 acres--after his father's death in 1976 and before his mother's death in 1978 by way of a straight land swap. The Government conceded that the property was not acquired through the use of drug proceeds.

Freddie Martin Saderfield testified for the Claimant that he was deeded some property by Claimant Chandler and in return his company provided materials and work on the property which is the subject of this litigation, to include grading the road on the property, putting in gravel, putting in curbing and gutters, pouring floors, and helping build ponds on the property. Mr. Saderfield estimated the value of this work and these materials to be between $38,000 and $40,000. Mr. Saderfield never saw

Government's witness Frazee on the property; he did see Baucom on the property mowing the grass, running errands, and getting firewood. He never saw anything like illegal drugs on the property in question.

The jury decided that the Claimant had failed to prove by a preponderance of the evidence that the property had not been improved by the exchange of controlled substances or by use of proceeds from the distribution of controlled substances. The jury also found that the Claimant had failed to establish by a preponderance of the evidence that the real property in question was not used or intended to be used to commit or facilitate the commission of the distribution or possession of controlled substances.

On appeal, the court of appeals specifically refused to apply a proportionality test to an Eighth Amendment analysis (App.

2a). The court of appeals also held that Congress may alter or set the burden of proof in civil cases without constitutional implications. (App. 14a).

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S RULING VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT BY REFUSING TO ADOPT A PROPORTIONALITY ANALYSIS AND CREATES A SPLIT IN THE CIRCUITS WHICH SHOULD BE RESOLVED.

Following the decision by this Court in Austin v. United States, ___ U.S. ___, 113 S.Ct. 2801, 2812 (1993), leaving development of a proportionality test to the lower courts in forfeiture cases, most courts considering the issue have adopted a proportionality analysis examining multiple factors to decide whether a forfeiture violates the excessive fine clause of the Eighth Amendment; the Fourth Circuit expressly rejected a proportionality test and instead embraced an instrumentality test which a majority of this Court in Austin rejected.

The majority opinion in Austin seems

to have rejected the "significant relationship" test proposed by Justice Scalia's opinion in Austin. The majority opinion in Austin noted:

> Justice Scalia suggests that the sole measure of an in rem forfeiture's excessiveness is the relationship between the forfeited property and the offense. We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive.

113 S.Ct. at 2812 n.15 (1993).

The Fourth Circuit's emphatic embracing of an instrumentality test and rejection of a proportionality test in civil forfeiture actions such as this one conflicts with decisions of other courts of appeals. See United States v. R.R.#1, 14 F.3d 864 (3d Cir. 1994); United States v. Alexander, __ F.3d ___, WL 328566 (8th Cir. 1994); United States v. Sarbello, 985 F.2d 716 (3d Cir.

1993). Several federal district courts have noted that the Eighth Amendment's excessive fines clause requires a broader analysis than the instrumentality test articulated by the Fourth Circuit below. See United States v. 24214 Lamay Street, 1994 WL 272026 (C.D. Cal. June 15, 1994); United States v. 6625 Zumirez Drive, 845 F.Supp. 725 (C.D. Cal. 1994); United States v. Shelly's Riverside Heights Lot X, 851 F.Supp. 633 (M.D. Pa. 1994); United States v. 835 Seventh Street Rensselaer, 832 F.Supp. 43 (N.D. N.Y. 1993) (applying decision of Second Circuit prior to Austin in United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir. 1992) to excessive fines clause analysis).

Claimant has never been convicted of any drug offense in any court; it is manifest that the Government here was using the civil forfeiture framework to circumvent the criminal burden of proof and to punish the

Claimant by taking away his entire property worth at least $569,000, consisting of approximately 33 acres, which was Petitioner-Claimant's main remaining asset after a series of serious financial reverses and foreclosures against his other assets.

Language contained in this Court's opinion in Browning Ferris Industries v. Kilco Disposal, Inc., 492 U.S. 257, 300-301 (1989), clearly suggests that the excessive fines clause of the Eighth Amendment requires any forfeiture to be proportional.

In U.S. v. Littlefield, 821 F.2d 1365 (9th Cir. 1987), the court in a criminal forfeiture action remanded the case for determination of whether the entire parcel of land containing 40 acres should be forfeited even though the 700 marijuana plants involved had been cultivated only on a portion of the property. Here, the only evidence of use of the property in question

to facilitate marijuana sales within the relevant 5-year statute of limitations was testimony by Gary George and John Baucom to the effect that George picked up two bales of marijuana in a garage behind the house on the subject farm.

Since the jury found that Claimant-Petitioner failed to carry his burden of proof, the most that should have been forfeited under this evidence under the excessive fines clause of the Eighth Amendment would be the house and garage--not the entire 33-acre tract. Although there was a lot of testimony allowed about Claimant's having controlled substances in and about his house during prior years outside the statute of limitations--including some testimony by Government witnesses Baucom and Frazee to the effect that Claimant would give them controlled substances in small amounts--this evidence was relevant, if

believed, to show Claimant had knowledge of controlled substances, but because outside the applicable five-year statute of limitations, it could not be used to support forfeiture on theories of either facilitation or improvements.

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT, AND THE BILL OF ATTAINDER CLAUSE IN ARTICLE I OF THE CONSTITUTION REQUIRE THE GOVERNMENT TO HAVE THE BURDEN OF PROOF IN FORFEITURE ACTIONS UNDER 21 U.S.C. §§ 881(a)(6) & (a)(7).

While Petitioner must concede that the weight of authority is against his position that, in drug forfeiture actions, the Government--not the Claimant--should have the burden of proof throughout the case, Petitioner urges the Court now to consider the issue of whether it is constitutional

to place the burden of proof on the claimant to real property to prove a negative: that the property was not improved with drug proceeds and not used to facilitate drug offenses.

Given the clearly punitive and penal nature of the forfeiture statutes here involved, this Court in Austin, supra, recently held that it is a violation of the Eighth Amendment's Excessive Fines Clause for 21 U.S.C. §881 drug forfeitures to be excessive. The Court noted that the label "civil" did not govern the Eighth Amendment's applicability; the determinative feature was whether the forfeiture was punishment for a drug offense. Therefore, since in reality what is at stake is punishment, the Government should bear the burden of proving both the underlying basis for forfeiture and that it is not excessive under the Eighth Amendment.

Moreover, because the forfeiture statutes here involved, 21 U.S.C. 881(a)(6) & (7), are in nature criminal fines, not only should the burden of proof be on the Government, but it should be to prove the case beyond a reasonable doubt or by clear and convincing evidence. Accord see Judge Weinstein's suggestion that the present statutory burden of proof in drug forfeiture actions is unconstitutional. U.S. v. Leasehold Interest in 121 Nostrand Ave., 760 F.Supp. 1015, 1032 (E.D.N.Y. 1991). Cf. Department of Revenue v. Kurth Ranch, ___ U.S. ___, 114 S.Ct. 1937, 1945 (1994) (No. 93-144) (imposition of criminal fines requires proof beyond reasonable doubt).

The Supreme Court of Florida, construing drug forfeiture laws, has resoundingly concluded that under the due process clause of the Florida Constitution, the government in seeking to forfeit property must bear the

burden of proof, and that burden must be higher than a mere preponderance of the evidence--rather the burden should be by clear and convincing evidence: the same evidentiary burden the government must carry where it seeks to deprive individuals of basic rights, such as termination of parental rights. Department of Law Enforcement v. Real Property, etc., 588 So.2d 957 (Fla. 1991).

As Judge Weinstein wrote in Leasehold, "shifting of the burden of proof stacks the deck heavily in favor of the Government" and is questionable on both policy and constitutional grounds. 760 F.Supp. at 1032. This Court has ruled, in other contexts civil in nature, that where the government is seeking to take an important right away from an individual, it must bear the burden of proof by clear and convincing evidence. E.g. Santosky v. Kramer, 455 U.S. 745 (1982)

(parental rights). Surely in cases involving civil forfeiture of real property, including homesteads, the private interests at stake are equal in importance to those circumstances where the clear and convincing burden of proof standard has been held constitutionally required under the Due Process Clause.

At the very least, the burden of proof should be on the Government by a preponderance of the evidence, rather than on the Claimant. For example, even though this Court traditionally shows deference to other branches of government in the area of immigration law, in Landon v. Plascencia, 459 U.S. 21 (1982), it suggested that placing the burden of proof in an exclusion proceeding on a permanent resident alien seeking reentry into this country would not satisfy the due process clause of the Fifth Amendment. Due process requires even criminal

procedural protections in proceedings essentially criminal in nature where the individual interests at stake are sufficiently serious. E.g. In re Winship, 397 U.S. 358 (1970) (juvenile delinquency proceedings labelled essentially civil in nature; proof beyond reasonable doubt required).

As long ago as Boyd v. United States, 116 U.S. 616 (1886), this Court held that civil proceedings instituted for the purpose of declaring forfeiture of private property because of offenses committed by the owner are criminal in nature; therefore, Fourth and Fifth Amendment protections apply. And in the very recent case of U.S. v. James Daniel Good Property, ___ U.S. ___ (No. 92-1180), 114 S.Ct. 492 (1993), this Court held specifically that both the Fourth and Fifth Amendments apply to civil drug forfeiture actions.

The Ninth Circuit has commented that

the "'comparative absence of procedural safeguards in forfeiture actions has attracted increasingly critical attention' in recent years as government officials have stepped up the use of forfeiture as a means of curbing drug trafficking and the use of narcotics." U.S. v. One 1985 Mercedes, 917 F.2d 415, 420 (9th Cir. 1990), quoting Note, Constitutional Rights and Civil Forfeiture Actions, 88 Colum. L. Rev. 390, 391 (1988). Judge Weinstein in Leasehold, supra, correctly observed that characterizing the forfeiture statute involved in this case as civil "does not negate its essentially punitive nature...." 760 F.Supp. at 1032.

Finally, it may logically be said that placing the burden of proof on the claimant in a forfeiture action, such as Petitioner here, converts §881(a)(6) & (7) into what at common law was known as bills of pains and penalties, in violation of the Bill of

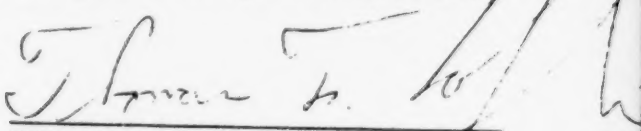
Attainder Clause of Article 1, §9 of the Constitution. United States v. Brown, 381 U.S. 437, 447, 85 S.Ct. 1707, 1714 (1965); Fletcher v. Peck, 6 Cranch 83, 3 L.Ed. 162 (1810). This is so because the statutes at issue in this case permit forfeiture of property--valuable property, real property--on the Government's establishing probable cause without the Government's having to prove--at least by a preponderance of the evidence--the "guilt" of the owner.

For the foregoing reasons, logic and past constitutional decisions of the Supreme Court require the burden of proof in a forfeiture action such as this one be on the Government.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT H. CHANDLER, II,
Claimant-Appellant,

and

THE REAL PROPERTY KNOWN AS TRACT 1 OF LITTLE RIVER FARMS, ROUTE 1, ISLAND ROAD, HILLSBOROUGH, ORANGE COUNTY, NORTH CAROLINA; ORANGE COUNTY,
Defendants,

EASTERN SKATEBOARD SUPPLY, INCORPORATED,
Claimant.

No. 93-2064

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
William L. Osteen, Sr., District Judge.
(CA-91-352-1)

Argued: June 7, 1994

Decided: September 27, 1994

Before WILKINSON, NIEMEYER, and WILLIAMS,
Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Wilkinson and Judge Williams joined. Judge Wilkinson wrote a separate concurring opinion.

COUNSEL

ARGUED: Thomas Franklin Loflin, III, Durham, North Carolina, for Appellant. Gill Paul Beck, Assistant United States Attorney, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Walter C. Holton, Jr., United States Attorney, Greensboro, North Carolina, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

We must consider in this case the important question of whether civil forfeiture to the United States of a 33-acre farm, due to its involvement in violations of the federal drug laws, constitutes an excessive fine under the Eighth Amendment. While the Supreme Court held in *Austin v. United States*, 113 S. Ct. 2801 (1993), that such forfeitures are limited by the Excessive Fines Clause of the Eighth Amendment, it left to the lower courts the task of articulating the appropriate standard for determining excessiveness. We articulate in this case an instrumentality test, rejecting any proportionality test, for determining whether a civil forfeiture under 21 U.S.C. §§ 881(a)(6) & (a)(7) is excessive. After applying the instrumentality test to the facts of this case, and considering the other challenges raised on appeal by the property's owner, we affirm the "decree and judgment of forfeiture" entered by the district court.

I

The United States brought this civil *in rem* action in July 1991 against Tract 1 of Little River Farms in Orange County, North Carolina, seeking to take title to the 33-acre property under 21 U.S.C. §§ 881(a)(6) & (a)(7). Little River Farms is located in a secluded rural area approximately 20 miles from Durham, North Carolina, a couple of miles off the main road. The next closest house is at least 300 yards away from the property. The property is valued at approximately $569,000 and is owned by Robert H. Chandler, II, who inherited the property from his mother at the time of her death in 1978. The gov-

ernment alleged in its complaint that the property was "used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of Title II of the Controlled Substances Act, 21 U.S.C. [§ 801] *et seq.*" and that the property constituted "proceeds traceable to the exchange of controlled substances."

Chandler, who is the sole owner of Little River Farms, intervened and filed a claim to the property in answer to the forfeiture complaint. Chandler alleged that the property did not constitute the proceeds of any drug dealing and that it was not used to facilitate the commission of any violation of the drug laws. In his answer, he specifically denied the government's allegations of his involvement in drug transactions and claimed that he "has no knowledge of, and did not give any consent for, the subject real property being used or intended for use to commit or facilitate the commission of a violation of 21 U.S.C. § 801 *et seq.* by any person."

At trial, the government's principal witnesses, John Baucom, Doug Frazee and Gary George, all testifying under grants of immunity, stated that they had distributed, packaged, sold, purchased and used controlled substances, including marijuana, cocaine and quaaludes, on Little River Farms. Baucom, who had worked for Chandler at Little River Farms, testified that he was paid in marijuana and cocaine by Chandler for doing maintenance-type work on the property, such as cutting grass, and for doing landscaping and minor carpentry work. He stated that on approximately 30 to 40 occasions, Chandler paid him $100 and a half-gram of cocaine in the basement of the farmhouse. Baucom also testified that he had observed Chandler in the basement with between one and two pounds of marijuana and that he saw others, including George, pick up marijuana from Chandler on at least three occasions. Baucom testified that at times, he was instructed by Chandler to serve as a lookout while Chandler and George consummated drug deals on the farm.

Frazee testified that between 1985 and 1986, he was hired by Chandler to do maintenance work on Little River Farms. He testified that on at least a dozen occasions, he was paid by Chandler with a quarter of a gram to a gram of cocaine for his work done on the property. He stated that the drugs were usually given to him in the kitchen of the farmhouse. In addition, Frazee testified that on at least 15 occa-

sions between 1984 and 1987, Chandler sold him cocaine in quantities ranging from a quarter of a gram to an ounce, worth up to $1,400.

George testified that Chandler distributed two bales of marijuana to him in the garage of Little River Farms in 1987. Each bale weighed between 30 and 40 pounds and was valued at approximately $500 to $600 per pound, for a total value of approximately $30,000 to $48,000. George testified that he had noticed that there were approximately two or three more bales of marijuana stored inside of the trunk of a car in the garage. George also stated that he observed Chris Nash, a Chandler employee, burning marijuana wrappers on the farm.

At the close of the evidence, the district court found that probable cause that the property was subject to a forfeiture had been established by the government and shifted the burden to Chandler to show, by a preponderance of the evidence, that the property was not used for illegal purposes or that he did not know about the illegal use. Chandler presented other witnesses, who had been employed on Little River Farms, who testified that they had never seen Chandler give either Baucom or Frazee any drugs. These witnesses also stated that they had never seen Chandler either use or store drugs on the property. Chandler himself took the stand and testified that he had inherited the property from his parents and that he had not engaged in any illegal activities.

At the conclusion of the evidence, the jury found in favor of the United States, concluding that the property had been used to facilitate the commission of violations of the drug laws, that the property was improved by the proceeds of drug exchanges, and that Chandler could not claim a lack of awareness. On July 9, 1993, the court entered a "decree and judgment" forfeiting the 33-acre farm to the United States subject to prior liens recorded against the property. This appeal followed.

II

Chandler contends that the forfeiture constituted an excessive fine in violation of the Eighth Amendment.[1] He claims that he has never

[1]The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

been convicted of any drug offense in any court and that this civil forfeiture proceeding is being used by the government "to circumvent the criminal burden of proof and to punish [him] by taking away his entire property worth at least $569,000, consisting of approximately 33 acres." He argues that even if he failed to carry his burden with respect to whether the property had been involved in the violation of drug laws, "the most that should have been forfeited under this evidence under the excessive fines clause of the Eighth Amendment would be the house and garage — not the entire 33-acre tract."

The Controlled Substances Act, enacted in 1970, includes provisions for the forfeiture to the United States of property used in or intended to be used in the commission of a violation of drug laws which are punishable by more than one year's imprisonment. *See* 21 U.S.C. § 881. The forfeiture proceeding is civil in nature and relies on the nexus between the property and illegal drug activity. Property is subject to forfeiture if it is given in exchange for drugs; if it is "traceable" to a drug transaction; if it is used in committing or facilitating the commission of a drug offense; or if it is intended for such use. *See* 21 U.S.C. §§ 881(a)(6) & (a)(7). The owner of an interest in the property may defend against forfeiture by showing that the offense involving the property was committed without his knowledge or consent. *Id.* Because a forfeiture action is *in rem*, elements of a claim establishing forfeiture focus principally on the property's role in the offense and not on the owner's guilt.

The procedure governing a civil forfeiture action is that prescribed for seizures in admiralty. *See* 21 U.S.C. § 881(b). The government may seize property if it can establish probable cause to believe that the property has the statutorily prescribed nexus to illegal drug activity which is punishable by more than one year's imprisonment. *See* 21 U.S.C. § 881(b)(4). It is not an element of the government's case to prove the involvement of the property's owner in the commission of the offense giving rise to the forfeiture. By carrying the burden of establishing that the violation occurred "without the knowledge or consent of that owner," however, the owner establishes a defense to the forfeiture. *See* 21 U.S.C. § 881(a)(6) & (a)(7).

The *in rem* nature of a forfeiture action brought under 21 U.S.C. § 881 and the adverse effect on the property's owner of such forfei-

ture raises unique questions about the proper application of the constitutional limit of excessiveness, which Chandler claims was exceeded.

In this case, after Chandler made the Eighth Amendment objection and the jury rendered its verdict, but before the court entered the decree and judgment of forfeiture, the Supreme Court decided *Austin v. United States*, 113 S. Ct. 2801 (1993), which held that *in rem* civil forfeiture proceedings are subject to the limitations of the Eighth Amendment's Excessive Fines Clause.[2] Until then, the circuit courts had been split over whether the Excessive Fines Clause applied in a context outside of criminal proceedings. *See United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 35 (2nd Cir.), *cert. denied*, 113 S. Ct. 55 (1992) (Eighth Amendment applies to *in rem* civil forfeiture); *but see United States v. Tax Lot 1500, Township 38 South, etc.*, 861 F.2d 232, 234-35 (9th Cir. 1988), *cert. denied sub nom. Jaffee v. United States*, 493 U.S. 954 (1989) (Eighth Amendment does not apply in civil proceedings).

In *Austin*, the Supreme Court reviewed the history of forfeitures in England and in the United States and concluded that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." 113 S. Ct. at 2810. Applying the general conclusion to the drug forfeiture statute at issue in the case, the Supreme Court held that forfeiture under 28 U.S.C. §§ 881(a)(4) & (a)(7) constitutes "'payment to a sovereign as punishment for some offense,'. . . and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Id.* at 2812 (internal citations omitted). The Court, however, declined to put forth a test for determining when a forfeiture is constitutionally excessive, stating that "[p]rudence dictates that we allow the lower courts to consider that question in the first instance." *Id.*

Thus, in order to resolve Chandler's Eighth Amendment challenge, we must first discharge the task given to us by *Austin* of articulating the standard under which to determine when a forfeiture is excessive. Since *Austin*, a few courts have begun to formulate tests for determining the excessiveness of a forfeiture in civil proceedings. These cases

[2]The district court did not reconsider the Eighth Amendment issue in light of *Austin*.

seem to recognize two approaches to an excessiveness inquiry, one utilizing the instrumentality principle proposed by Justice Scalia in his concurring opinion in *Austin*, and the other adopting the traditional Eighth Amendment proportionality principle articulated in *Solem v. Helm*, 463 U.S. 277 (1983). *See United States v. R.R. #1*, 14 F.3d 864 (3d Cir. 1994); *United States v. Alexander*, ___ F.3d ___, 1994 WL 328566 (8th Cir. July 12, 1994); *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D.Cal. 1994). The tendency of the courts, including those listed above, has been to combine the two principles of instrumentality and proportionality to come up with various multi-factor tests. *See, e.g., United States v. 6625 Zumirez Drive*, 845 F. Supp. at 732 (describing the factors as "(i) the inherent gravity of the offense compared with the harshness of the penalty; (ii) whether the property was an integral part of the commission of the crime; and (iii) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use"); *United States v. 429 S. Main St.*, 843 F. Supp. 337, 341 (S.D. Ohio 1993) ("it is appropriate to compare the value of the property against the nature of the offense . . . [and] also appropriate to look to the nature of the relationship between the crime and the property in question"); *United States v. 427 & 429 Hall Street*, 853 F. Supp. 1389, 1399 (M.D. Ala. 1994) (putting forth a two step balancing test "which emphasizes 'instrumentality' analysis but includes 'proportionality' analysis").

While we have not addressed the question directly, we stated in dictum in *United States v. Borromeo*, 1 F.3d 219 (4th Cir. 1993), in the context of remanding a case to the district court for further development, that in light of *Austin*, "an inquiry into the proportionality between the value of the instrumentality sought to be forfeited and the amount needed to effectuate the legitimate remedial purposes of the forfeiture would seem to be in order." *Id.* at 221. We now undertake to state the appropriate standard to be applied in conducting an excessiveness analysis under the Eighth Amendment for *in rem* forfeitures. To do this, we begin by looking more closely at the historical justification for forfeiture and the effect that a forfeiture has on the property's owner.

In rem forfeitures were historically grounded on the fiction that the property itself was considered the "offender" and accordingly, the innocence of an owner was not a defense. *See The Palmyra*, 25 U.S.

(12 Wheat.) 1, 15 (1827) ("the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*"); *Dobbins's Distillery v. United States*, 96 U.S. 395, 400 (1878) ("the thing in such a case is primarily considered as the offender, or rather that the offence is attached primarily to the thing"); *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 513 (1921) ("It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental."). Nonetheless, a forfeiture of property effects punishment on its owner. This appears more clearly so when, as provided in the Controlled Substances Act, the forfeiture law provides an innocent owner defense, implying that some owner culpability is being punished by the Act's forfeiture provisions. *See* 28 U.S.C. §§ 881(a)(6) & (a)(7). In his concurring opinion in *Austin*, Justice Scalia, summarizing the Act's conceptual basis in this regard, stated: "the property must 'offend' *and* the owner must not be completely without fault." 113 S. Ct. at 2814 (Scalia, J., concurring). Since, however, the *property* itself is the object of the action, and not its value, Justice Scalia noted, the value of the property is irrelevant to whether it is forfeitable. *Id.* He added, "the question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense." *Id.* at 2815. Justice Scalia concluded that any analysis under the Eighth Amendment into excessiveness thus must go to whether the property was "an instrumentality of the offense." *Id.*

It is apparent that Congress, in providing for civil forfeiture of property involved in drug offenses for which punishment exceeds one year, *see* 21 U.S.C. § 881, did not intend to punish or fine by a particular amount or value; instead, it intended to punish by forfeiting property of whatever value which was *tainted* by the offense. Accordingly, the constitutional limitation on the government's action must be applied to the degree and the extent of the taint, and not to the value of the property or the gravity of the offense.

The question of excessiveness is thus tied to the "guilt of the property" or the extent to which the property was involved in the offense, and not its value. This point can be illustrated by comparing two hypotheticals. Forfeiture of a $14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the

United States, would probably offend no one's sense of excessiveness, even though the property has such a high value. On the other hand, forfeiture of a row house, which is owned by an elderly woman and which shelters her children and grandchildren, upon discovery of a trace amount of cocaine in a grandson's room, might arguably be found to be excessive, even though the house has a relatively low value of $30,000. In both cases, the intuitive excessiveness analysis centers on the *relationship* between the property and the offense — the more incidental or fortuitous the involvement of the property in the offense, the stronger the argument that its forfeiture is excessive. When measuring the strength or extent of the property's relationship to the offense, *i.e.*, its instrumentality in the offense, we would look at whether the property's role was supportive, important, or even necessary to the success of the illegal activity. We would also inquire into whether the use of the property was deliberate or planned, as distinguished from incidental or fortuitous. We would note whether the property was used once or repeatedly, whether a small portion was used, and whether the property was put to other uses and the extent of those uses.

While our aim under this instrumentality test for determining excessiveness is directed at discovering the property's role in the offense, we are also mindful that the punishment effected by a forfeiture is imposed on the owner. Thus, while the extent of the owner's culpability may be of minor relevance to the question of whether, *vel non*, a forfeiture can properly be imposed, it becomes more relevant when determining whether the "fine" is excessive. Thus, where the owner's involvement in the offense is only incidental, as opposed to extensive — *e.g.*, where he is simply aware of the offense but not a perpetrator or conspirator — this fact will weigh on the excessiveness side of the scales.

Finally, we note that since the property *in kind* is at stake, and not its value, a judgment of forfeiture is largely an all-or-nothing situation, and an inquiry into excessiveness can determine only on which side of the line the facts place the property. We might very well say that it would be an excessive "fine" to forfeit a building in which "an isolated drug sale happens to occur," *see Austin*, 113 S.C. at 2815, but that it would not be excessive to forfeit a building that acted solely as a drug emporium for packaging, selling, distributing, and using

drugs. However, a concern about excessiveness may be tempered by the pragmatic possibility of separating offensive property from non-implicated property, when the offending property is readily separable. *See Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring).

For these stated reasons, we now hold, in determining excessiveness of an *in rem* forfeiture under the Eighth Amendment, that a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spacial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. No one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.[8]

In adopting this instrumentality test for determining excessiveness of *in rem* forfeitures, we are mindful that some courts have also considered and adopted a proportionality test. *See, e.g., United States v. R.R. # 1*, 14 F.3d at 874-75; *United States v. 6625 Zumirez Drive*, 845 F. Supp. at 732-33. Traditionally, the principle of proportionality in the Eighth Amendment has been associated with the Cruel and Unusual Punishment Clause, rather than the Excessive Fines Clause. *See Weems v. United States*, 217 U.S. 349, 366-67 (1910). In *Solem v. Helm*, 463 U.S. 277, 284 (1983), the Supreme Court applied the principle to hold that the Cruel and Unusual Punishment Clause "pro-

[8]We do not find that the approach articulated here and that expressed in the concurring opinion are in any sense inconsistent.

hibits not only barbaric punishments, but also sentences that are *disproportionate to the crime committed.*" (Emphasis added). At issue in that case was the constitutionality of a life imprisonment without parole sentence for an offender who committed his seventh non-violent felony by uttering a 'no account' check in the amount of $100. The Court's three-part test in *Solem* has come to be standard inquiry in constitutional proportionality analysis, looking to: 1) the inherent gravity of the offense, 2) the sentences imposed for similarly grave offenses in the same jurisdiction, and 3) sentences imposed for the same crime in other jurisdictions. 463 U.S. at 290-91.

We conclude, however, that the above three-part test does not apply to the Excessive Fines Clause analysis for two reasons. First, the holding of *Solem* has been put into doubt by *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991). At least two justices, Justice Scalia and Chief Justice Rehnquist, flatly stated that the proportionality principle did not exist in the Eighth Amendment and thus *Solem* was wrongly decided. *Id.* at 2686. Although the separate opinion of Justice Kennedy, joined by Justice O'Connor and Justice Souter, did not go so far, it did limit the scope of *Solem*, stating, "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 2705.

Second, the *Solem* proportionality principle, if it does exist in the Eighth Amendment, derives from the Cruel and Unusual Punishment Clause and not the Excessive Fines Clause. While the principle of proportionality is traditionally associated with discussions of whether punishment is cruel and unusual, *see, e.g., Harmelin v. Michigan*, 111 S. Ct. at 2680, we believe that it is not applicable when considering the excessiveness of a forfeiture of specifically identified property. The statute does not limit the value of property subject to forfeiture, and the history of the Eighth Amendment supports no such constitutional limitation. *See Austin*, 113 S. Ct. at 1807-1810.

With these principles at hand, we turn to the facts of this case to see whether the forfeiture of Chandler's property was excessive.

III

Addressing first the nexus between the property and the offense, the testimony of government witnesses Frazee, Baucom and George

established that from 1984 to 1988, Chandler's property served as the situs for over 130 drug transactions, some involving thousands of dollars. While it would appear that the farm had substantial purposes other than serving as an instrument of drug activity, the property nevertheless was an important, if not necessary, instrument for the drug activity, in providing a secluded location. Baucom testified that Chandler instructed him to serve as a lookout on the long private road leading up to the property, evidencing the secluded nature of the property which provided privacy for the illegal activities. Evidence indicated that neither the house in which the drug transactions took place nor the garage in which the drugs were stored could be seen from the public road. Evidence also showed that a security camera was installed on the private driveway, near the gate at the entrance to the property, further indicating the intent of the owner to utilize the property's seclusion in carrying out the alleged offenses.

On the extent of the use of the property for illegal activities, evidence showed not only the large number of transactions over a period of years, but also that the use permeated to the basement, the kitchen, the garage, and the long driveway. Moreover, the property itself was maintained and improved by payments made with drugs. Baucom testified that he was paid in cocaine and marijuana, or combination of drugs and money, on at least 30 to 40 occasions for cutting grass, landscaping, and doing minor carpentry work on Little River Farms. Frazee testified that between 1985 and 1986, he was paid at least a dozen times by Chandler with a quarter of a gram to a gram of cocaine for work performed on the property.

Considering the second part of the test, the role and culpability of Chandler as the property's owner, it can hardly be argued that he was not culpable. The testimony of government witnesses showed that he procured drugs, stored them on the property, paid his employees with drugs, and sold drugs to others. The evidence amply shows that he was not merely aware, but actively involved, in the commission of the illegal conduct.

Finally, while Chandler has urged that we mitigate the punishment that the forfeiture will impose on him by forfeiting only the areas of the 33-acres where the farmhouse and the garage are located, he has provided no evidence that this area is on a separately platted property

that could be readily separated. In the absence of such evidence, and in light of the ample evidence in support of forfeiture, the entire 33-acre property, as identified in the warrant for its seizure, may be forfeited.

In short, the overwhelming evidence presented by the government showed that Little River Farm was both a substantial and meaningful instrumentality of the alleged drug offenses. We have no difficulty in concluding that the forfeiture of the 33-acre property known as Little River Farms was legal under 21 U.S.C. §§ 881(a)(6) & (a)(7) and did not violate the Excessive Fines Clause of the Eighth Amendment.

IV

We briefly address the remainder of the challenges to the forfeiture presented by Chandler on this appeal. Chandler asserts that the district court erred in holding that the government had proffered a race-neutral explanation for peremptorily challenging the last black woman from the venire. During the jury voir dire, when the government's attorney struck the last black venire member, Ms. Brown, from the pool, Chandler's counsel objected on *Batson* grounds. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting racial discrimination in exercising peremptory challenges in criminal litigation); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying *Batson* to civil litigation). When the district court asked the government attorney for an explanation, the attorney explained that Ms. Brown did not seem to have strong convictions; that he had no sense about Brown's views regarding drugs and forfeiture; that she was young, unmarried, and had no children; that her boyfriend, who was not working, was in the court; and that he preferred leaving an older woman on the jury who had a family and provided him with a better attitude with respect to what the government was trying to accomplish. The court concluded that the reasons were race-neutral and overruled Chandler's objection. On appeal, Chandler does not take issue with the government's position that the articulated reasons were race-neutral. Rather, he argues that a review of the record reveals that Ms. Brown in fact had stated that she had two children and that therefore the government's reason for striking her was a pretext. We find nothing, however, to establish that the government's attorney did not believe the grounds it gave during the trial. Indeed, Chandler's attorney did not point out the mis-

taken fact at the time. Chandler has not shown that the government's preemptory challenge of Brown was racially motivated.

Chandler also asserts that the district court erred by allowing the government to present its evidence first in the trial and by placing the burden of proof on him after the government's case. Chandler asserts that because there was a first trial which ended in a mistrial, where the government had established probable cause as a matter of law, it was repetitive for the court to require the government to present its evidence again. Chandler argues that the district court should have declared, as a matter of law, that the government had established probable cause and permitted Chandler to present his evidence first. As the district court properly noted, however, it would have been improper for the district court to limit the government to the evidence presented in the first trial but allow Chandler to include new evidence, with the help of the previous trial's experience. Thus, it was not an abuse of discretion for the district court to arrange the order of proof under the forfeiture statute, by having the government present its probable cause showing first, and then having the burden shift to the claimant. *See United States v. 7715 Betsy Bruce Lane Summerfield*, 906 F.2d 110, 111 (4th Cir. 1990). In addition, we have held in *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989), that it is not unconstitutional to shift the burden to the claimant, after the probable cause showing, to prove his entitlement to the property: "Undoubtedly, Congress may alter the burden of proof in a civil proceeding as it sees fit, without constitutional implications."

Chandler next asserts that the district court's refusal to admit a prior inconsistent written statement of one of the government's witnesses, Thomas Roberts, was an abuse of discretion. Chandler asserts that that inconsistent statement would have impeached Robert's testimony that Chandler helped him unload a shipment of marijuana from Colombia. The district court has broad discretion to admit or reject evidence, *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990), and here, the court independently determined that the prior written statement was irrelevant to the current proceedings because it described drug transactions that were distinct from Chandler's own activities. We conclude that the district court's ruling fell well within the court's discretion.

Finally, Chandler asserts that the district court's instruction to the jury that his interest in Little River Farms was forfeitable even if it facilitated only one felony drug offense was erroneous. We reject this argument. This Court has explicitly held that "a *single* felony drug violation is all that is necessary to trigger 21 U.S.C. § 881(a)(7)." *United States v. Santoro*, 866 F.2d at 1542.

For the foregoing reasons, the district court's "decree and judgment of forfeiture" is accordingly

AFFIRMED.

WILKINSON, Circuit Judge, concurring:

I am pleased to concur in Judge Niemeyer's fine opinion. I agree that an instrumentality, rather than a proportionality, test is the proper one to determine whether forfeiture of property under 21 U.S.C. § 881(a) is excessive under the Eighth Amendment.

An Eighth Amendment instrumentality test is preferable to a proportionality test because it promotes both judicial economy and judicial restraint. To begin with, the Eighth Amendment instrumentality test bears a far closer relationship to the questions actually decided in a civil forfeiture proceeding. A verdict in favor of forfeiture will foreclose, in most instances, an Eighth Amendment claim under an instrumentality inquiry. This is as it should be, since the Eighth Amendment does not authorize judges to apply their personal notions of propriety to civil forfeiture proceedings.

I.

The language of § 881 sets a clear standard for determining whether property is forfeitable:

> (a) **Property subject.** The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . .

> (7) All real property, . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(7). The standard established by § 881 goes far toward answering the instrumentality inquiry: real property is subject to forfeiture only if the property has been used, or was intended to be used, to facilitate the commission of a drug-related crime that would be punishable by more than one year's imprisonment under the Controlled Substances Act. *See Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801, 2811 (1993). If the statutory prerequisites for forfeiture are carefully observed, a judgment of forfeiture generally will satisfy the instrumentality test adopted by the court today. Eighth Amendment concerns will often be subsumed within the finding in favor of forfeiture.

The congruence between civil forfeiture judgments and an Eighth Amendment instrumentality inquiry can easily be demonstrated. The court declares that "to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense." ___ F.3d at ___. This inquiry mirrors the threshold probable cause inquiry in an *in rem* forfeiture proceeding almost exactly. A judge or jury asking whether the statutory nexus between the property and the illegal activity has been established will nearly answer the question the court's totality test seeks to resolve. That is, a judgment of forfeiture *presumes* a consideration of the totality of the circumstances: "It is well established, both in the law of forfeiture and in other areas of the law, that the probable cause inquiry is a flexible one in which the court must consider the 'totality of the circumstances.'" *United States v. $121,100.00 in United States Currency*, 999 F.2d 1503, 1506 (11th Cir. 1993) (citations omitted). *See also United States v. Thomas*, 913

F.2d 1111, 1115 (4th Cir. 1990) (noting that in a forfeiture proceeding, a court determines probable cause by reference to "the facts in their totality").

The factfinder's task in a forfeiture proceeding is to determine whether the subject property was "substantially connected" to illegal activity. *See United States v. 7715 Betsy Bruce Lane*, 906 F.2d 110, 112-13 (4th Cir. 1990) (probable cause is established by a "substantial connection" between the property and the illegal activity). This question too parallels the Eighth Amendment instrumentality inquiry. The statutory "innocent owner" defense in § 881(a)(7) likewise goes far toward assuaging Eighth Amendment concerns: an owner has an opportunity to refute the government's prima facie showing of probable cause by asserting his lack of culpability. To the degree that this court lists as Eighth Amendment concerns either of these statutory factors — the nexus between the property and the illegal activity and the owner's culpability — these include the very elements one would expect to come before the trier of fact in a forfeiture proceeding. Indeed, the court notes that both factors were determined by the jury in this case to weigh in favor of forfeiture: "At the conclusion of the evidence, the jury found in favor of the United States, concluding that the property had been *used to facilitate the commission of violations of the drug laws*, . . . and that Chandler could not claim a lack of awareness." ___ F.3d at ___ (emphasis added).

In *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980), the Seventh Circuit, in affirming the right to trial by jury in a civil forfeiture proceeding under 21 U.S.C. § 881, observed that "the infusion of the earthy common sense of a jury might upon occasion mitigate appropriately the harsh impact sometimes characteristic of *in rem* procedure." *Id.* at 469. By answering the statutory inquiry in the affirmative, the trier of fact determines not only that forfeiture is appropriate, but to a great extent that forfeiture of the property is not harsh or excessive under an instrumentality test. Such a verdict would foreclose an Eighth Amendment challenge in all but egregious circumstances.*

*In some instances, of course, the nexus inquiry is never presented to a jury but is resolved as a matter of law by the court. Specifically, if a

II.

A straight proportionality test, in contrast to an instrumentality test, bears little analytical relationship to a judgment of forfeiture. A proportionality analysis requires consideration of the value of the illegal drugs at issue and whether the value of the subject property overwhelms the amount involved in the drug transaction. *See, e.g., United States v. 427 and 429 Hall Street*, 853 F. Supp. 1389, 1400 (M.D. Ala. 1994) (proportionality inquiry measures "the value of the defendant property against the scope of the drug trafficking"). This question does not necessarily mirror the factfinder's inquiry. It is possible that a factfinder could find a nexus between the subject property and a drug transaction sufficiently close to satisfy the statutory standards, yet the property could still be deemed non-forfeitable under a proportionality inquiry if it were, for instance, an extremely expensive home or automobile. Too frequently proportionality analysis serves only to insulate those who have "hit it big" in the drug trade from the forfeiture prescribed by statute.

III.

In sum, I agree that an instrumentality test is the appropriate test to be applied in determining whether a forfeiture is excessive under 21 U.S.C. §§ 881(a)(4) and (a)(7). Any constitutional test, however, must be designed with an appropriate measure of judicial restraint.

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claimant fails to rebut the government's showing of probable cause, the government is entitled to forfeiture of the subject property on summary judgment. *See Thomas*, 913 F.2d at 1114. A finding of probable cause is also a question of law which is subject to plenary review on appeal. *See, e.g., 7715 Betsy Bruce Lane*, 906 F.2d at 112. These principles do not, however, alter the analysis of the Eighth Amendment inquiry. Whether a court awards forfeiture on summary judgment or a trier of fact awards forfeiture after a trial, the very fact that the statutory requisites for forfeiture have been satisfied goes far toward precluding an Eighth Amendment challenge. An affirmance of the trial court's finding of probable cause, for example, will generally foreclose independent consideration of an Eighth Amendment excessiveness challenge: if the subject property has been found to be "substantially connected" with illegal drug activity, the instrumentality test has almost by definition been satisfied.

The results under an open-ended, multi-factor Eighth Amendment inquiry have displayed a lack consistency and structure. *Compare United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 732-38 (C.D. Cal. 1994) (adopting a three-part excessiveness test and holding forfeiture unconstitutional) *with 427 and 429 Hall Street*, 853 F. Supp. at 1399-1402 (adopting a different excessiveness test and holding forfeiture constitutional). A recognition of the relationship between the Eighth Amendment inquiry and the civil forfeiture scheme will remedy this difficulty. The jury's verdict of forfeiture in this case necessarily meant that the property was used to facilitate violations of the drug laws and that appellant could not avail himself of an innocent owner defense. Appellant has failed to establish the egregious circumstances necessary to overturn the jury's verdict of forfeiture on Eighth Amendment grounds. It follows that I would affirm the judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

UNITED STATES OF AMERICA, Plaintiff,	:	CIVIL FILE NO. 1:91CV00352
v.	:	
THE REAL PROPERTY KNOWN AS TRACT 1 OF LITTLE RIVER FARMS, ROUTE 1, ISLAND ROAD, HILLSBOROUGH, ORANGE COUNTY, NORTH CAROLINA, Defendant.	:	

FINAL DECREE AND JUDGMENT OF FORFEITURE

OSTEEN, District Judge

WHEREAS on June 16, 1993, a jury in the subject case returned a verdict of forfeiture as it pertains to the claim of Robert H. Chandler, II, in the defendant property, and on July 9, 1993, the Court entered a Decree and Judgment of Forfeiture in which all interests that Robert H. Chandler, II, may have in the defendant real property were forfeited to the United States of America for disposition according to law.

AND WHEREAS based on the foregoing Stipulation For Compromise Settlement between the plaintiff, United States of America, and the claimants, Eastern Skateboard Supply, Inc., and Orange County, North Carolina, and other matters of record, it is hereby ORDERED, ADJUDGED, and DECREED:

1. That the United States Marshal Service pay Eastern Skateboard Supply Inc., the sum of $14,778.30, with a per diem of $2.45 from July 17, 1993, until paid, which includes accrued interest and costs, as recorded in Judgment Docket 37, Page 259, Office of Superior Court of Orange County, North Carolina, and as reflected in the Stipulation for Compromise Settlement, from the proceeds of sale of the defendant property, after all United States Marshal expenses related to the forfeiture of the defendant property are paid.

2. That the United States Marshal

Service pay Orange County, North Carolina, the following sums representing tax liens recorded on the defendant property in the amounts of $3,196.48 for the year 1990, $3,111.12 for the year 1991, $2,996.95 for the year 1992, $4,197.12 for the year 1993, and an estimated $4,200.00 for the year 1994 (1994 taxes constitute a lien on the property, but the exact amount of the lien can not be computed until the 1994 tax rate is established by the Board of Commissioners of Orange County, North Carolina). The tax liens for the years 1990, 1991, and 1992, will accrue additional interest at the rate of three-quarters of a percent per month beginning September 1, 1993. The tax lien for the year 1993 will accrue interest at the rate of two percent (2%) for the first month, and three-quarters of a percent for each month thereafter beginning January 1, 1994, if not paid on or before January 6,

1994. The plaintiff, United States of America and claimant Orange County, North Carolina agree that the aforementioned sums (to include the finally determined 1994 Orange County tax amounts) will be paid to Orange County from the proceeds of sale of the defendant property, after all United States Marshal expenses related to the forfeiture of the defendant property are paid.

3. Now therefore, pursuant to 21 U.S.C. §881, the defendant real property known as Tract 1 of Little River Farms, Route 1, Island Road, Hillsborough, Orange County, North Carolina, is hereby forfeited to the United States of America for disposition according to law and in accordance with this Final Decree and Judgment of Forfeiture.

SO ORDERED this 5th day of August, 1993.

/s/
UNITED STATES DISTRICT JUDGE

Seen and agreed to:

/s/_____
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/s/_____
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FILED
MAR 31 1995

No. 94-1143

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT H. CHANDLER, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the civil forfeiture of petitioner's 33-acre farm on the ground that the farm was improved with proceeds of drug offenses and facilitated those offenses constituted an excessive fine under the Eighth Amendment.

2. Whether it violated due process to require petitioner to bear the burden of proof on his defense to forfeiture once the government established that there was probable cause for forfeiture of the property.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Austin v. *United States*, 113 S. Ct. 2810 (1993) 4-5, 6, 7, 10
Bramble v. *Richardson*, 498 F.2d 968 (10th Cir.), cert. denied, 419 U.S. 1069 (1974) 10
United States v. *Alexander*, 32 F.3d 1231 (8th Cir. 1994) 8
United States v. *D.K.G. Appaloosas, Inc.*, 829 F.2d 532 (5th Cir. 1987), cert. denied, 485 U.S. 976 (1988) 10
United States v. *4492 S. Livonia Road*, 889 F.2d 1258 (2d Cir. 1989) 10
United States v. *9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994) 8
United States v. *One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F.2d 65 (9th Cir. 1976) 10
United States v. *Parcels of Land*, 903 F.2d 36 (1st Cir. 1990) 10
United States v. *Premises Known as RR No.1*, 14 F.3d 864 (3d Cir. 1994) 8
United States v. *Price*, 914 F.2d 1507 (D.C. Cir. 1990) 10
United States v. *Santoro*, 866 F.2d 1538 (4th Cir. 1989) .. 6
United States v. *Sarbello*, 985 F.2d 716 (3d Cir. 1993) 8
United States v. *228 Acres of Land*, 916 F.2d 808 (2d Cir. 1990) 10
United States v. *Ward*, 448 U.S. 242 (1980) 11
United States v. *Wild*, No. 93-5630 (4th Cir. Mar. 2, 1995) 8

Case—Continued:

	Page
United States v. *Williams*, 112 S. Ct. 1735 (1992)	11

Constitution and statutes:

U.S. Const.:	
Art. I, § 9, Cl. 3 (Bill of Attainder Clause)	11
Amend. VIII (Excessive Fines Clause)	4, 6, 7, 10
19 U.S.C. 1615	9
19 U.S.C. 1621	9
21 U.S.C. 881	6, 9
21 U.S.C. 881(a)(6)	2, 10
21 U.S.C. 881(a)(7)	2, 10
21 U.S.C. 881(d)	9

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 36 F.3d 358.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1994. The petition for a writ of certiorari was filed on December 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, a 33-acre farm claimed by petitioner was civilly forfeited to the United States under 21 U.S.C. 881(a)(6) and (7). The court of appeals affirmed. Pet. App. 1a-19a.

1. The United States commenced this in rem action against Tract 1 of Little River Farms in Orange County, North Carolina, alleging that the property was "proceeds" traceable to exchanges of controlled substances, that it had been used to facilitate drug offenses, and that therefore it was forfeitable under 21 U.S.C. 881(a)(6) and (7). The 33-acre property, valued at approximately $569,000, was owned solely by petitioner, who inherited it from his mother in 1978. Petitioner intervened in the action to contest the forfeiture. He disputed the factual allegations of the complaint, and claimed in the alternative that he had had no knowledge of any drug activities on the property. Pet. App. 2a-3a.

At trial, government witnesses John Baucom, Doug Frazee, and Gary George testified that they had distributed, packaged, sold, purchased, and used controlled substances, including marijuana, cocaine, and quaaludes, on Little River Farms. Baucom, who worked for petitioner at the farm, testified that he was paid in marijuana and cocaine by petitioner for doing maintenance work on the property, such as cutting grass, landscaping, and minor carpentry jobs. He testified that on approximately 30 or 40 occasions, petitioner paid him $100 and a half-gram of cocaine in the basement of the farmhouse. Baucom also testified that he observed petitioner in the basement with one

or two pounds of marijuana, and that he saw other persons, including George, pick up marijuana from petitioner on at least three occasions. Baucom also testified that he was at times instructed by petitioner to serve as a lookout while petitioner and George consummated drug deals on the farm. Pet. App. 3a.

Frazee testified that he did maintenance work on the farm in 1985 and 1986, and that on at least a dozen occasions petitioner paid him for his work with cocaine. He usually received the drugs in the kitchen of the farmhouse. In addition, Frazee testified that on at least 15 occasions between 1984 and 1987, petitioner sold him cocaine in quantities ranging from a quarter of a gram to an ounce. Pet. App. 3a-4a.

Finally, George testified that in 1987 petitioner distributed to him two bales of marijuana in the garage of the farm. Each bale weighed 30 or 40 pounds, and together the two bales were worth between $30,000 and $48,000. George testified that he noticed that there were two or three more bales of marijuana stored inside the trunk of a car in the garage. George also testified that he observed Chris Nash, one of petitioner's employees, burning marijuana wrappers on the farm. Pet. App. 4a.

2. At the close of the government's case, the court found that probable cause had been established by the government and that the burden had shifted to petitioner to show, by a preponderance of the evidence, that the property was not used in the commission of drug offenses or that he did not know about the illegal use. Petitioner called several witnesses who worked on the farm. They testified that they never observed petitioner with any drugs on the property. Petitioner testified that he had not engaged in any illegal activities on the farm. Pet. App. 4a.

The jury found that the property had been used to facilitate drug offenses, that it was improved using the proceeds of drug offenses, and that petitioner could not claim lack of knowledge of the illegal activities. The district court entered a decree and judgment forfeiting the farm to the United States. Pet. App. 4a.

3. The court of appeals affirmed. Pet. App. 1a-19a. The court rejected petitioner's claim that the forfeiture of the farm violated the Excessive Fines Clause of the Eighth Amendment. The court noted that, after the jury verdict in this case, *Austin* v. *United States*, 113 S. Ct. 2801 (1993), held that the Excessive Fines Clause applies to civil forfeitures. The court also noted that *Austin* specifically declined to adopt "a test for determining when a forfeiture is constitutionally excessive," leaving that question for further development in the lower courts. Pet. App. 6a.

In order to "discharge the task given [the lower courts] by *Austin* of articulating the standard" of excessiveness (Pet. App. 6a), the court of appeals drew upon Justice Scalia's concurring opinion in *Austin* (113 S. Ct. at 2812-2815), which suggested that the inquiry should focus on how closely tied the property was to the offense, rather than the value of the property as such. Pet. App. 8a. The court accordingly adopted the following method for evaluating whether a civil forfeiture is excessive (*id.* at 10a):

> [I]n determining excessiveness of an *in rem* forfeiture under the Eighth Amendment, * * * a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the

> property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spacial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense.

The court found that "instrumentality test" readily satisfied in this case. *Id.* at 11a-13a.

The court noted that petitioner's farm served as the location for more than 130 drug transactions between 1984 and 1988, and it emphasized that petitioner's drug deals in the house and garage benefitted from the seclusion of the surrounding acreage. For example, the court noted that petitioner installed a security camera near the entrance to the long private road leading to the property and instructed Baucom to keep watch there. Pet. App. 12a. The court also noted that the property was improved with the proceeds of drug transactions, because petitioner used drugs to pay for maintenance work on the farm, and that petitioner was a knowing participant in all aspects of the drug activity on the farm. Finally, because petitioner produced no evidence that the im-

mediate situs of the drug transactions—the house and garage—was separately platted and could be readily separated from the surrounding acreage, and "in light of the ample evidence in support of forfeiture," the court concluded that "the entire 33-acre property, as identified in the warrant for its seizure, may be forfeited."[1]

Relying on its decision in *United States* v. *Santoro*, 866 F.2d 1538, 1544 (1989), the court of appeals also rejected petitioner's claim that it violated due process for him to bear the burden of proof on his affirmative defenses to forfeiture. The court explained that it is "not unconstitutional to shift the burden to the claimant, after the probable cause showing, to prove his entitlement to the property." Pet. App. 14a.

ARGUMENT

1. Petitioner argues (Pet. 16-21) that the court of appeals erred in failing to adopt a "proportionality analysis" under the Excessive Fines Clause, and that its decision conflicts with those of other courts of appeals. That claim warrants no further review.

In *Austin* v. *United States*, 113 S. Ct. 2801 (1993), this Court held that the Excessive Fines Clause applies to civil in rem forfeitures under Section 881, because the protection of the Clause is not limited to criminal proceedings and the civil forfeiture at issue was punitive in effect. 113 S. Ct. at 2806-2812. As the

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[1] Judge Wilkinson, concurring, Pet. App. 15a-19a, argued that a verdict of forfeiture reached in accordance with the prerequisites of Section 881 "would foreclose an Eighth Amendment challenge in all but egregious circumstances." Pet. App. 17a. He concluded that no such egregious circumstances were shown here that would justify overriding the jury's verdict. *Id.* at 19a.

court of appeals recognized, however, *Austin* expressly declined to adopt a test for determining whether a forfeiture is constitutionally "excessive" and left that issue open for development by the lower courts. *Id.* at 2812. The Court stated that it would not "rule out the possibility that the connection between the property and the offense may be relevant" in determining excessiveness, but noted that its decision did not "limit [the lower courts] from considering other factors" that might also be relevant. *Id.* at 2812 n.15. In a concurring opinion, Justice Scalia suggested that the sole measure of an in rem forfeiture's excessiveness is the relationship between the forfeited property and the offense. *Id.* at 2814-2815.

Since *Austin*, the courts of appeals have had few occasions to consider what analysis governs the issue whether an in rem civil forfeiture under Section 881 violates the Excessive Fines Clause. For that reason the issue is not ripe for consideration by this Court. Indeed, the decision below is the only federal appellate decision to pronounce a square holding on the issue. The court of appeals did not, as petitioner contends (Pet. 16-17), adopt the strict "instrumentality test" advocated by Justice Scalia in *Austin*. While the court relied heavily on the relationship between the offense and the property (a factor that the *Austin* majority conceded could be relevant to the excessiveness inquiry), it also gave significant weight to the criminal culpability of the property's owner. Pet. App. 10a.

Two other courts of appeals have expressed dissatisfaction with exclusive reliance on a strict "instrumentality" test for excessiveness as articulated by Justice Scalia's concurrence in *Austin*. See

United States v. *9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994); *United States* v. *Premises Known as RR No. 1*, 14 F.3d 864 (3d Cir. 1994). One of those courts has suggested the appropriateness of considering the monetary value of the property in determining whether the forfeiture is excessive. *9638 Chicago Heights*, 27 F.3d at 330-331. In neither case, however, was the court's discussion of the excessiveness issue necessary to its decision. See *id.* at 330 (noting that court's reversal of forfeiture on another ground obviated need to decide whether the forfeiture was excessive under *Austin*); *Premises Known as RR No. 1*, 14 F.3d at 873 (in reversing summary judgment in the government's favor and remanding for trial, the court left the determination of excessiveness to "the district court in the first instance * * *, if its resolution becomes necessary"). Those cases therefore do not conflict with the decision below.[2]

In any event, the forfeiture in this case was not excessive under any analysis. A strict "instrumentality" test would support forfeiture because the

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[2] Petitioner errs in suggesting (Pet. 17) that *United States* v. *Sarbello*, 985 F.2d 716 (3d Cir. 1993), and *United States* v. *Alexander*, 32 F.3d 1231 (8th Cir. 1994), conflict with the decision below. Those cases involved criminal in personam forfeitures, not the type of civil in rem forfeitures at issue in this case. After its decision in this case, the court of appeals made clear that it agrees with, and will follow, the holdings of *Sarbello* and *Alexander* when assessing claims of excessiveness in the context of criminal in personam forfeitures. See *United States* v. *Wild*, No. 93-5630 (4th Cir. Mar. 2, 1995), slip op. 8-9 ("We agree * * * that, because this case involves an *in personam* criminal forfeiture * * *, *Chandler* does not control * * * and the value of the property being forfeited is a factor to be considered").

property was directly and repeatedly used to commit drug offenses and its size and secluded location substantially facilitated the commission of those crimes. As the court of appeals noted (Pet. App. 12a-13a), petitioner's active and knowing involvement in the drug offenses that occurred on the farm, and the commission of those offenses for his benefit further support the conclusion that the forfeiture in this case was not excessive.

A "proportionality" analysis likewise demonstrates that the forfeiture of petitioner's farm was not excessive. Petitioner was involved in the wholesale distribution of narcotics worth hundreds of thousands of dollars. The bales of marijuana observed on the property in 1987 alone were worth $100,000, and the evidence indicated that their presence was but part of a longstanding pattern of drug trafficking on the property. See Pet. App. 4a.[3] Forfeiture of property worth $569,000 is not disproportionate to that conduct.

2. Petitioner also contends (Pet. 21-28) that it is unconstitutional to require a forfeiture claimant to bear the burden of proving affirmative defenses to the forfeiture of the property. That claim does warrant review.

By virtue of 21 U.S.C. 881(d), the provisions of 19 U.S.C. 1615, which govern the burden of proof for customs forfeitures, apply in Section 881 proceedings.

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[3] Contrary to petitioner's apparent assumption, see Pet. 19-21, the statute of limitations applicable to the forfeiture runs from "the time when the alleged offense was discovered," 19 U.S.C. 1621, not from the time when the offense occurred. In any event, as petitioner concedes, Pet. 20, the storage of bales of marijuana on the property in 1987 fell within the five-year limitations period.

Section 1615 provides that, once the government has demonstrated that probable cause exists for forfeiture of the property, a person claiming the property has the burden of proving by a preponderance of the evidence that the property is not subject to forfeiture. All the courts of appeals to consider the question have held that the statute's allocation of the burden of proof is constitutional. See *United States* v. *228 Acres of Land*, 916 F.2d 808, 814 (2d Cir. 1990); *United States* v. *Price*, 914 F.2d 1507, 1512-1513 (D.C. Cir. 1990); *United States* v. *Parcels of Land*, 903 F.2d 36, 49 (1st Cir. 1990); *United States* v. *4492 S. Livonia Road*, 889 F.2d 1258, 1270 (2d Cir. 1989); *United States* v. *Santoro*, 866 F.2d 1538, 1543-1544 (4th Cir. 1989); *United States* v. *D.K.G. Appaloosas, Inc.*, 829 F.2d 532 (5th Cir. 1987), cert. denied, 485 U.S. 976 (1988); *United States* v. *One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F.2d 65, 66 (9th Cir. 1976); *Bramble* v. *Richardson*, 498 F.2d 968, 973 (10th Cir.), cert. denied, 419 U.S. 1069 (1974). Indeed, petitioner does not contend that there is any division of authority on that question.

Petitioner asserts that the forfeiture provisions of Section 881(a)(6) and (7) "are in nature criminal fines" and therefore the government should bear the burden of proving "the case beyond a reasonable doubt or by clear and convincing evidence." Pet. 23. An in rem forfeiture, however, is not by nature a "criminal fine." This Court's reasoning in *Austin* was not that a forfeiture is a criminal fine, but rather that the Excessive Fines Clause applies both to civil and criminal "punishments," and accordingly applies to a punitive forfeiture even though it is *not* a criminal fine. *Austin* specifically declined to address the issue of whether civil forfeiture proceedings are by their

nature criminal proceedings to which criminal-law burden of proof rules apply, 113 S. Ct. at 2806 & n.6, and petitioner has not made the difficult showing necessary to overcome Congress's expressed intention to create a civil forfeiture provision. See *United States* v. *Ward*, 448 U.S. 242, 249 (1980).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1995

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[4] Petitioner also argues (Pet. 27-28) that the current allocation of the burden of proof in forfeiture proceedings violates the Bill of Attainder Clause of the Constitution, Art. I, § 9, Cl. 3. That issue was not raised or passed upon below, and thus is not properly before this Court. See *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992). In any event, the forfeiture lacks the character of imposing individual punishment necessary to make out a Bill of Attainder claim. *Nixon* v. *Admin. of General Serv.*, 433 U.S. 425, 474 (1977).